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EXAMINER

STULII, VERA

ART UNIT

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* KENNETH GIMELLI  
and MARC JOSEPH GLASSER

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Appeal 2009-002852  
Application 10/795,936  
Technology Center 1700

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Decided:<sup>1</sup> June 9, 2009

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Before EDWARD C. KIMLIN, CHARLES F. WARREN, and  
CATHERINE Q. TIMM, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the Decided Date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1, 5, 7-9, 11, 13, 19, and 20. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

## I. STATEMENT OF THE CASE

The invention relates to an improved farinaceous-based food product, such as a pasta composition. (Spec. 1, ll. 2-4). Claim 1 is illustrative of the subject matter on appeal:

1. A farinaceous-based food product comprising

(a) about 1.0% to about 15.0% by weight of a protein additive;

(b) about 0.25% to about 2.5% by weight of a hydrophobic ester; and

(c) about 65.0% to about 95.0% by weight of a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein;

(d) about 4.0% to about 18.0% by weight water;

wherein the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification.

The Examiner relies on the following prior art references to show unpatentability:

Ventres et al. ("Ventres")	EP 0 350 552 A1	Jan. 17, 1990
Oh et al. ("Oh")	US 6,217,918 B1	Apr. 17, 2001

"Emulsifier Technology in Foods," *Wiley Encyclopedia of Food Science and Technology* (2<sup>nd</sup> Edition), John Wiley & Sons, p. 605 (1999) ("Wiley Encyclopedia").

The Examiner maintains the following rejections:

1. Claims 1, 5, 7-9, 11, and 13 rejected under 35 U.S.C. § 102(b) as anticipated by Ventres, citing *Wiley Encyclopedia* as additional evidence of the teachings of Ventres; and
2. Claims 19 and 20 rejected under 35 U.S.C. § 103(a) as obvious over Ventres in view of Oh.

## II. ISSUE ON APPEAL

The dispositive issue on appeal arising from the contentions of Appellants and the Examiner is: did the Examiner reversibly err in finding that Ventres explicitly or inherently teaches a food product made from a flour mixture with “about 50% by weight of the flour mixture comprising gluten protein,” as recited in claim 1, such that claim 1 is anticipated by Ventres?

## III. FACTUAL FINDINGS

The following Findings of Fact (FF) are relevant to deciding the issue on appeal:

1. Appellants’ Specification states:

The flour suitable for use to make the farinaceous-based food product of this invention may be, for example, bean, barley, oat, potato, soy, durum semolina, buckwheat, rice, kamut, corn, rye, spelt, bleached, unbleached, whole wheat, yam, gluten flour or mixtures thereof, with the proviso that at least about 50.0%, and preferably, at least about 60.0%, and most preferably, from about 65.0% to about 100.0% by weight of the flour employed comprises gluten protein (i.e., prolamines and glutelins). In an especially preferred embodiment, the farinaceous-based food product of this

invention comprises 100.0% durum semolina as the flour source.

(Spec. 5, ll. 1-8).

2. Ventres states:

a feedstock comprised of glutinous flour and water is utilized. The term “glutinous flour” as used herein is intended to include and describe flours which provide a self-supporting paste when mixed with water. . . . Semolina flour, also referred to as “semolina” herein, is a common, hard, coarse, wheat flour obtained from durum wheat. . . . There are different grades of semolina having different glutinous properties. Both high grade and low grade semolina are intended to be included in the glutinous flours suitable for this invention.

(Ventres 3, ll. 40-48).

#### IV. PRINCIPLES OF LAW

In situations involving virtually little or no need to make selections, a reference may be considered to describe the claimed subject matter within the meaning of 35 U.S.C. § 102. *See In re Schaumann*, 572 F.2d 312, 316-17 (CCPA 1978) (Reference anticipated because it embraced a very limited number of compounds closely related to one another in structure such that the reference provided a description of those compounds just as surely as if they were identified in the reference by name, one of those compounds being the claimed compound).

However, generic descriptions such as the description of a broader range of values for a parameter, may not be sufficiently specific to constitute a “description” that anticipates the claimed subject matter. *See Atofina v. Great Lakes Chem. Corp.*, 441 F.3d 991, 1000 (Fed. Cir. 2006)(broader prior art temperature range of 100-500°C did not describe the narrower

claimed range of 330-450°C “with sufficient specificity to anticipate” nor did the overlapping prior art oxygen to methylene chloride molar ratio of 0.001-1.0% describe “with sufficient specificity” the claimed 0.1-5.0 % a molar ratio).

## V. ANALYSIS

The Examiner relies upon the Appellants’ Specification stating that the farinaceous-based food product of this invention may comprise 100.0% durum semolina as the flour source, as evidence that Ventres teaches at least 50% by weight of the flour mixture comprising gluten protein (Ans. 8). Appellants’ Specification states that durum semolina, which is the same “glutenous flour” taught by Ventres (FF 2), is the preferred flour and may constitute 100% of the flour source (FF 1). However, this portion of Appellants’ Specification merely states that the flour source may be pure durum semolina flour rather than a mixture of flours. Appellants’ Specification does not state that the gluten protein content of durum semolina flour is necessarily at least 50% by weight. (FF 1.)

Ventres does not specifically disclose using a grade of semolina flour having at least 50% by weight of gluten protein (FF 2). In this case, the teaching of “high” and “low” grade semolina flour (with various gluten properties) (FF 2), is not sufficiently specific enough to teach that the semolina flour has at least 50% by weight of gluten protein.

Accordingly, the Examiner reversibly erred in finding that Ventres explicitly or inherently teaches a food product made from a flour mixture with “about 50% by weight of the flour mixture comprising gluten protein,” as recited in claim 1, such that claim 1 is anticipated by Ventres.

## VI. CONCLUSION

For the reasons discussed above, we cannot sustain the Examiner's rejection of claims 1, 5, 7-9, 11 and 13 under 35 U.S.C. § 102(b) as being anticipated by Ventres. The Examiner rejected dependent claims 19 and 20 under 35 U.S.C. § 103(a) as obvious over Ventres further in view of Oh. However, the defect discussed above was not remedied in this rejection. According, we cannot sustain any of the Examiner's rejections.

## VII. DECISION

We reverse the Examiner's decision.

REVERSED

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